No. 88-2031 (9)

Supreme Court, U.S.
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IN THE

e Court of the United States

OCTOBER TERM, 1989

ER OF AMERICA, - - - - - - - - - - Petitioner,

VERSUS

AND
- - - - - - - - - - - - Respondents.

TO THE UNITED STATES
FOR THE FOURTH CIRCUIT

FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should construe a Postal Service regulation, that bans all solicitation on postal premises, not to apply to exterior sidewalks open to the general public?

2. Whether a Postal Service regulation that bans all solicitation is unconstitutional as applied to respondents' peaceful political expression on a sidewalk open to the general public?

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In the

Supreme Court of the United States

October Term, 1989

No. 88-2031

UNITED STATES OF AMERICA, - - - - - - **Petitioner,**

versus

MARSHA B. KOKINDA AND KEVIN E. PEARL, - - - - - - - - - **Respondents.**

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Respondents, Marsha Kokinda and Kevin Pearl, are volunteers for the National Democratic Policy Committee (NDPC). The NDPC is a political advocacy group which seeks to inform the public about political, cultural and scientific ideas. These ideas include human welfare concerns such as eliminating Acquired Immune Deficiency Syndrome ("AIDS") and drug abuse from our society.

On August 6, 1986, respondents set up a table on the sidewalk in front of the Bowie, Maryland post office. They distributed NDPC

literature and solicited contributions to their organization. The Court of Appeals for the Fourth Circuit described the geography of the Bowie, Maryland post office as follows:

> The sidewalk on which [respondents] set up their table is approximately seven feet wide and is located on postal service property. The sidewalk runs in front of the Bowie post office and postal patrons must use this walkway to enter the building. A post office parking lot is contiguous to the sidewalk and both the parking lot and the post office building itself are set back from a public road. A municipal sidewalk abuts the public road, runs in front of the parking lot, and is parallel to the post office sidewalk.

United States v. Kokinda, 866 F.2d 699, 700 (4th Cir. 1989). The table on the sidewalk was approximately five to six feet from the main entrance to the building. (J.A. 33, 94.)

Petitioner United States alleged at trial before a federal magistrate that the Bowie, Maryland post office received between 40 and 50 complaints from postal patrons about respondents' activities. (J.A. 69.) The court of appeals, however, discounted these so-called complaints.

> The record reveals that postal employees received "'forty to fifty'" complaints concerning Pearl and Kokinda. [Postal patron Janet] Wyatt testified that, because she knew the Girl Scouts were not allowed to sell cookies on federal property, she asked a clerk if Kokinda and Pearl's activities were not also illegal. [J.A. 59.] The record is completely silent as to the nature or focus of the other thirty-nine to forty-nine complaints. For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers.

866 F.2d at 705.

There was no evidence that respondents or their materials were blocking, obstructing, or interfering with the entranceway to the building. On the contrary, Postal Inspector Julius Cochran testified

that respondents had set up their card table between a mailbox and a pole (J.A. 33), i.e., not directly in the main pedestrian path. He further testified that the respondents' table only protruded onto the sidewalk about as far as did the adjacent mailbox. (J.A. 30.) Nevertheless, the postal inspector arrested respondents and filed a criminal complaint against them. The complaint alleged that on August 6, 1986, respondents solicited signatures and publications for the NDPC on the property of the United States Postal Service at Bowie, Maryland in violation of 39 C.F.R. § 232.1(h) (1989). A subsequent information charged respondents with soliciting contributions on behalf of the NDPC.

A federal magistrate found respondents guilty of solicitation in violation of 39 C.F.R. § 232.1(h),[1] and respondents appealed to the district court. The district court affirmed respondents' convictions. Pet. for Cert., App. B.

Thereafter, respondents appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals reversed respondents' convictions, holding that

> [b]ecause we believe that the post office sidewalk constitutes a public forum and that the postal regulation is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values, we hold 39 C.F.R. § 232.1(h) an unconstitutional infringement upon defendants' rights. No significant government interest has been demonstrated that would be narrowly accommodated by eliminating an entire category of political speech from this public forum. The convictions of these defendants are therefore reversed.

866 F.2d at 700. Petitioner filed a petition for rehearing and for rehearing in banc, which the court of appeals denied on April 14, 1989. Pet. for Cert., App. C. On June 13, 1989, petitioner filed its petition for a writ of certiorari with this Court. On October 2, 1989, this Court granted the writ. (J.A. 97.)

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[1] The government, in its statement, asserts that the magistrate also convicted respondents of trespassing on postal property. Brief for United States at 6. On the contrary, the magistrate reached a verdict of not guilty on this count. (J.A. 82.) The government has never contested this verdict.

SUMMARY OF ARGUMENT

The sidewalk upon which respondents were arrested is concededly open for general access by respondents, as well as by any other members of the public, Brief for United States at 13, 27, not only for postal business but also for expressive activities, *id.* at 4, 15, 16, 30, 37. No fee or permit is necessary to use this sidewalk. On the contrary, people of all ages, and from all walks of life, can and do come and go at will. The government has conceded that members of the public may engage in a variety of forms of oral expression while upon this sidewalk, *id.* at 4, 37, and that people may picket, *id.* at 15, and freely distribute literature as well, *id.* at 4, 15, 16, 30, 37. In short, the general public is free to engage in virtually every form of peaceful, expressive activity upon this sidewalk, from casual conversation to heated political debate, from religious proselytization to the distribution of tracts, from protest vigils to exhortations in support of a given cause or organization, from picketing to caroling.

Yet, in the case at bar, the government has attempted to "impose[] a categorical ban on one manner of expression," *id.* at 16 -- solicitation -- and enforce that ban against respondents' peaceful political expression. This attempt to suppress core political speech must fail.

In the first place, the postal regulation forbidding the solicitation of funds does not apply to the unenclosed exterior grounds and sidewalks of a post office. This Court, whenever fairly possible, will construe a law so as to avoid constitutional difficulties. *Boos v. Barry*, 108 S. Ct. 1157, 1169 (1988). In the present case, the relevant regulation is readily susceptible to a limiting construction that would avoid the need to confront constitutional questions. The history and context of the regulation indicate a clear concern with the undesirable features of solicitation which takes place *inside* postal premises. The regulation evidences no intent to outlaw solicitation in the open plazas or sidewalks which sometimes surround post offices. This Court should therefore decline, absent a clear expression of regulatory intent, to extend the scope of the solicitation ban to such open, exterior locations. Thus, respondents, who admittedly were engaged in expressive activity upon an open, outside sidewalk, did not come within the scope of the prohibitory regulation.

Secondly, if the regulation does ban all solicitation on postal sidewalks, it is unconstitutional as applied to respondents' peaceful, political expression on a sidewalk open to general public use.

Solicitation is a form of speech protected under the first amendment to the Constitution. *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2673 (1988). Restrictions on such expression must withstand exacting constitutional scrutiny. *Id.*

The sidewalk at issue in the present case constitutes a public forum. The public may come and go at will, without permission or supervision, and people are free to engage in expressive activities while present. *United States v. Grace*, 461 U.S. 171 (1983); *cf. Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981). In fact, this sidewalk is functionally indistinguishable from any other public sidewalk. See *Grace*, 461 U.S. at 179, 182. In such a place a total ban on solicitation is impermissible absent a compelling interest strictly justifying the ban. *Grace*; *Riley*. No such overriding interest appears here.

Even aside from public forum doctrine, restrictions on solicitation in places available for public access must be narrowly tailored to further a valid and sufficiently weighty countervailing government interest. *Riley*, 108 S. Ct. at 2675. Under this standard, the ban on solicitation must fall as applied to the circumstances of this case. The ban on solicitation is tied directly to the content of the speech involved, singling out for legal proscription those speakers who utter a request for funds. No compelling interest supports this artificial categorization. The prohibition is admittedly not a reasonable time, place, or manner restriction, but is instead a complete ban on solicitation. Brief for United States at 40, 42; 43 Fed. Reg. 38,824 (1978). No inherent characteristic of solicitation, however, makes it a valid target for outright prohibition. The general public has undisputed access to the sidewalks in question, and members of the public carry with them there, as elsewhere, their rights to engage in peaceful, orderly expression. *Jamison v. Texas*, 318 U.S. 413, 416 (1943). There is no basis for concluding that solicitation will be necessarily -- or even usually -- more likely to disrupt pedestrian passage or to annoy passersby on sidewalks outside post offices than on any other sidewalks open to the public. Moreover, solicitation is

not so dramatically and inherently different from the variety of other forms of free speech, such as picketing or leafletting, as to justify singling out solicitation for total prohibition. Passersby are as free to ignore solicitors as any other speakers in open public places. There is no more a captive audience problem on postal sidewalks than on any other sidewalks.

Moreover, the notion that a flat ban is necessary because reasonable regulations would be impractical, Brief for United States at 40, defies common sense. The Postal Service already forbids littering, destruction of property, obstruction of passageways, excessive noise, and other disruptive or disorderly conduct. 39 C.F.R. § 232.1(c), (e) (1989). A ban on solicitation adds nothing except a penalty on the peaceful, orderly solicitation of funds, a form of protected speech.

Finally, the definition of illegal solicitation is impermissibly vague as applied to this case. The government concedes that speakers may promote their organizations and may inform listeners how they might contribute funds. Brief for United States at 16, 39, 43-44. Speakers may even distribute forms explicitly urging support and explaining where to send donations. *Id.* Only the most intrusive and censor-like government scrutiny might discern a border between these permitted forms of solicitation and those solicitations which are deemed unlawful. In effect, the determination of illegality depends entirely upon the subjective view of the enforcement officer who decides whether the speaker will be deemed to have crossed the elusive boundary between "virtual" solicitation, *id.* at 16, on the one hand, and solicitation itself, on the other. Attaching criminal significance to such inscrutable vagaries intolerably chills the exercise of protected free expression.

This Court should therefore affirm the judgment of the court of appeals overturning respondents' convictions for solicitation.

ARGUMENT

This is not an access case. The government concedes that respondents, like other members of the general public, have the right to enter the sidewalks surrounding the Bowie post office. Brief for United States at 13, 27. The government also concedes that respondents may distribute literature promoting their organization, *id.* at 4, 15, 16, 30, 37, that respondents may accost passersby and attempt to engage them in political discussions, *id.* at 4, 37, and that respondents may -- to an uncertain, ill-defined extent -- suggest and even facilitate financial contributions, *id.* at 16, 39, 43-44.

The issue in this case, therefore, is whether the government may single out and prohibit a single, undefined form of pure speech: solicitation of funds.

The court of appeals held that the government's effort to ban solicitation on sidewalks outside a post office violates the first amendment to the Constitution. The court of appeals therefore overturned respondents' convictions for unlawful solicitation. This Court should affirm the judgment of the court of appeals.

I. THE BAN ON SOLICITATION ON POSTAL PREMISES DOES NOT APPLY TO AN OUTSIDE SIDEWALK OPEN TO THE PUBLIC.

The postal regulation banning solicitation does not apply to solicitation taking place on sidewalks open to the public and located outside of a post office. Hence, the regulation does not apply to respondents' activities.

"Our normal course is first to ascertain whether a construction of the [challenged law] is fairly possible by which the constitutional question may be avoided." *United States v. Grace*, 461 U.S. 171, 175-76 (1983) (brackets, internal quotation marks, and citations omitted).

Federal courts undeniably have the power to adopt narrowing constructions of federal law. *Boos v. Barry*, 108 S. Ct. 1157, 1169 (1988) (and cases cited). "Indeed, the federal courts have the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Id.* (and cases cited) (emphasis added).

The anti-solicitation regulation at issue in the present case readily lends itself to such a narrowing construction. [2] The regulation

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[2] This Court has held that it should explore the possibility of a narrowing construction even where that issue was not raised in the lower courts. Thus, in *United States v. Grace*, 461 U.S. 171 (1983), the Court ruled that "we should answer" the question of a limiting construction of a federal law even though the appellees did not raise the issue until oral argument before the

(continued)

provides, in pertinent part, as follows:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.

39 C.F.R. § 232.1(h)(1) (1989). The postal regulations do not define "postal premises." [1] This term must be reasonably interpreted, however, in light of the purposes and context of the regulation. So viewed, this regulation sensibly applies only to interior, enclosed postal premises, and not to outside walkways.

Supreme Court. *Id.* at 176. In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), the Court adopted a narrow interpretation of a municipal ordinance, *id.* at 2501, even though counsel for neither side had pressed such a construction in the lower courts or before this Court, at least prior to oral argument, *see id.* at 2505 (White, J., concurring in judgment).

[1] The relevant regulatory section applies, *in general*, to "all real property" under the control of the Postal Service. 39 C.F.R. § 232.1(a) (1989). *See also* 37 Fed. Reg. 24,346 (1972) ("These regulations . . . shall apply without limitation to all buildings and areas owned or occupied by the Postal Service"). This, however, is not the end of the matter. Other specific postal regulations in this same section -- regulations which, if construed in rigid, literal fashion, would apply to "all real property" -- also stand in obvious need of reasonable narrowing constructions.

For example, one provision regulates the taking of photographs. 39 C.F.R. § 232.1(i) (1989). This subsection authorizes photographs "for news purposes" in "entrances, lobbies, foyers, corridors, or auditoriums," but prohibits all "[o]ther photographs" without official permission. Clearly "other photographs" must be limited to mean photographs, for purposes other than news, of postal *interiors*. Otherwise, this provision -- banning photographs of the grounds while allowing news photos of the interior -- would suffer from both absurdity and constitutional infirmity.

Another provision states that "properties" shall be "closed to the public after normal business hours." 39 C.F.R. § 232.1(b)(2) (1989). A different regulation, however, requires that all post offices provide a regulation letterbox "in front of or next to the post office" (or, in the case of fourth-class post offices, provide a slot in the outer post office door), 39 C.F.R. § 243.2(e) (1989), obviously for public use outside of normal working hours. If the public is to use these after-hours mailboxes or slots, however, they must be free to enter onto unenclosed postal grounds. Hence, the subsection requiring the closure of "properties" to the public after hours must be construed to apply only to interior or fenced-off premises. Moreover, the regulation contemplates that "authorized individuals" "may be required to sign the register" in order to enter "such properties." 39 C.F.R. § 232.1(b)(2) (1989). It would be bizarre to imagine that this procedure applies to any postal "properties" other than buildings or enclosures.

The predecessor anti-solicitation regulation, 39 C.F.R. § 232.6(h) (1973), also forbade "[s]oliciting alms and contributions . . . on postal premises . . . ." *See* 37 Fed. Reg. 24,346 (1972). This earlier version, however, authorized the Red Cross to conduct fundraising at "stands *in lobbies*," § 232.6(h)(2) (emphasis added), and further authorized "similar national organizations" to "solicit funds at designated locations *on postal premises*," *id.* (emphasis added).

The Postal Service subsequently described these exceptions -- which employed both the term "postal premises" and the term "lobbies" -- as "dealing with fund raising . . . in post office *lobbies*," 38 Fed. Reg. 27,824 (1973) (emphasis added), indicating that the two terms were understood to mean the same thing: postal lobbies. In proposing an amended regulation, the Postal Service again described these exceptions as allowing nonprofit organizations "to use *lobby space* for fund raising compaigns," 42 Fed. Reg. 63,911 (1977) (emphasis added), declaring that "the use of space *in postal lobbies* should be discontinued entirely," *id.* (emphasis added). *Compare id.* (understanding the ban on electioneering to apply to "post office parking and maneuvering areas . . . as well as . . . post office lobbies").

In repealing these exceptions, the Postal Service yet again described these regulations as having "allowed the use of postal *lobby space*," 43 Fed. Reg. 38,824 (1978) (emphasis added). The explanation accompanying the new, total ban on solicitation confirmed that this regulation was targeted at solicitation in postal lobbies and similar interior areas.

> Most postal *lobbies* are layed [sic] out for the sole purpose of providing efficient service and cannot therefore accommodate nonpostal activities without disturbing *postal employees in the performance of their duties* and impeding the *public in transacting postal business*; additionally, the use of *lobbies* only by nonprofit philanthropic and charitable organizations for fund raising has come to be viewed as unjustifiably discriminatory by some excluded individuals and groups. . . .

> [The] act of soliciting alms or contributions . . . has the potentiality for evoking highly personal and subjective reactions. . . . Such confrontations, if occuring [sic] *in the confines of a small post office lobby, at a post office writing desk or service window, or in a queue at a service window -- places from which the individual cannot escape if he or she wishes to transact postal business* -- would be likely to produce hostile reactions and to cause people to avoid post offices. *In the circumstances*, a right to solicit alms and contributions was thought not integral to the exercise of speech and religious freedoms.

Id. (emphasis added). Plainly, this regulatory measure contemplates the particular problems of solicitation which takes place inside lobbies, foyers, and so forth. There is no indication of any concern with solicitation on open exterior grounds, places where postal patrons and employees are neither "captives" nor engaged in postal business.

Thus, the context, history, and expressed purposes of the ban on solicitation, as well as the canon of judicial construction that calls for the avoidance of constitutional questions whenever fairly possible, all weigh in favor of interpretating the ban on solicitation to apply only to interior or enclosed postal premises.[4] This Court should not extend the scope of this ban to include outside walkways open to the general public.[5]

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[4] The government cites previous "internal guidelines" of the Post Office Department which prohibited "'[s]oliciting [of] subscriptions, canvassing for the sale of any article, or making collections . . . in buildings operated by the Post Office Department, or on the grounds or sidewalks within the lot lines'" of postal properties. Brief for United States at 30 n.10 (quoting guidelines). The Postal Service, however, amended and broadened the scope of its previous restrictions on solicitation (as the government admits, see *id.*) at the same time that it promulgated a new section (now 39 C.F.R. § 232.1(a) (1989)) governing the applicability of these regulations. *See* 37 Fed. Reg. 24,346-47 (1972). The question for the Court is the scope of this *new* set of regulations, not the scope of predecessor "guidelines." The Court should not lightly assume an intent on the part of the Postal Service to establish contitutionally probematic measures.

[5] A narrow construction of the solicitation ban leaves the Postal Service free to consider (or, perhaps, to reconsider) the constitutional issues

(continued)

There is no dispute that respondents conducted their peaceful political activities on an open sidewalk outside the Bowie post office. The anti-solicitation regulation therefore does not apply to their activities, and this Court must affirm the judgment of the court of appeals overturning respondents' convictions for violation of this postal regulation.

II. THE BAN ON SOLICITATION IS UNCONSTITUTIONAL AS APPLIED TO PEACEFUL SOLICITATION ON A SIDEWALK OPEN TO THE PUBLIC.

Even if the postal ban on solicitation applies to activities conducted on open, exterior grounds, respondents cannot be convicted under this regulation. The ban on solicitation is unconstitutional as applied to respondents' peaceful political solicitation on a sidewalk open to the general public.

A. Solicitation is a Form of Protected Speech.

The government does not contest the established proposition that solicitation for noncommercial purposes[6] is a form of "fully protected expression" under the first amendment to the United States Constitution. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2677 (1988); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797-98 (1985).

This Court has "squarely held, on the basis of considerable precedent, that charitable solicitations 'involve a variety of speech interests . . . that are within the protection of the First Amendment . . . .'" *Riley*, 108 S. Ct. at 2673 (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)). As Justice Scalia observed in *Riley*, the precedents of this Court establish that solicitation is "fully protected as the dissemination of ideas," 108 S. Ct. at 2681 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted); hence, in solicitation cases, "core First Amendment speech is at issue," *id.*

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surrounding the restriction of peaceful solicitation in open, public places. Meanwhile, the regulation would remain in effect in those places of primary concern to the Postal Service -- lobbies and other interior areas.

[6] The cases typically address "charitable solicitation," broadly defined. The same constitutional principles govern solicitation for political purposes. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976)).

In *Riley*, this Court emphasized the rationale underlying the protected status of solicitation:

> Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

Id. at 2677 (additional citations and footnote omitted).

Restrictions on solicitation thus trigger "exacting First Amendment scrutiny." *Id.* at 2673. Limitations on solicitation violate the first amendment unless those limitations are "narrowly tailored," *id.* at 2673, 2675, to further a "sufficiently substantial" government interest, *id.* at 2675.

These first amendment concerns apply with full force in the case at bar, in which respondents were clearly promoting political, ideological materials. (J.A. 85-91) (Government Exhibits 10-16) (literature seized from respondents' table). Respondents' message may not be as popular as Thomas Paine's three-shilling pamphlets, *see* S. Edwards, *Rebel! A Biography of Tom Paine* 121 (1974),[7] but their speech is not for that reason subject to a lesser degree of constitutional protection.

B. The Suppression of Peaceful Solicitation on a Sidewalk Open to the Public Is Not Narrowly Tailored to Further Any Valid Government Interest.

The flat ban on solicitation, as applied to the circumstances before this Court, cannot withstand first amendment scrutiny. The

[7] Though honored today as a patriot, Paine was an ideological extremist for his times. "A great many people wondered if Paine was slightly mad. Certainly his attack on cherished institutions caused him to be regarded as a wild radical, and even Whigs who could find no fault with many of his arguments were shocked and dismayed by his assault on the monarchy." *Id.*

ban is simply not narrowly tailored to further any legitimate and sufficiently weighty government interest.

Analysis of the constitutionality of a ban on solicitation, as applied in the present case, must focus upon two principal considerations: first, the nature of the location and the compatibility of the speech in question with that location; and, second, the relation between any asserted countervailing government interests and the means used to further those interests.

Employing this analysis in the case at bar yields the following conclusions: the sidewalk at issue is a public forum, or at least is a public place wholly compatible with peaceful solicitation; and, a total ban on solicitation, on sidewalks open to the public, is not narrowly tailored to further any valid governmental interests.

Therefore, the solicitation ban is unconstitutional as applied in this case.

1. The sidewalk outside the Bowie post office is wholly compatible with peaceful solicitation.

As this Court has repeatedly held, "The right to use a public place for expressive activity may be restricted only for weighty reasons." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

Personal solicitation typically takes place either door to door or on public ways. In a multitude of cases, this Court has struck down restrictions on door-to-door solicitation. *See generally Schaumburg*, 444 U.S. at 628-32 (reviewing cases); *see also Riley*. As these cases make clear, *the right to engage in personal solicitation is not strictly limited to public fora.*[8] On the contrary, solicitors are generally free

[8] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), is not to the contrary. In *Cornelius*, the solicitors did not seek *physical access* to *open* public or private property; rather, they sought the right to *participation* in a *closed* federal fundraising campaign conducted by third-party volunteers. *Id.* at 801. The *Cornelius* Court "focused on the access sought by the speaker," *id.*, and found that no public forum was involved, *id.* at 804-06. In the standard door-to-door solicitation case, by

(continued)

to detour from public forum property in order to try to reach prospective donors -- whether a resident at his home, an entrepreneur at his shop, or a professional at his office.[9]

Of course, solicitation confined to the public ways is subject to even less government regulation than solicitation door to door. In public places, the "unique privacy interests of persons residing in their homes" do not apply. *Schaumburg*, 444 U.S. at 638-39.

The present case involves solicitation on a sidewalk open to general public use. This sidewalk is, under the precedents of this Court, a public forum. Even if the sidewalk is not deemed to be a strictly public forum, however, this sidewalk clearly is a public place on which solicitation is entitled to full first amendment protection.

a. The sidewalk outside the Bowie post office is a public forum.

The sidewalk at issue in the present case constitutes a public forum under the first amendment. That is, it is a public place open to general access, for any purpose or for no particular purpose, in which people are free to come and go, and which is essentially and functionally indistinguishable from any municipal sidewalk.

This Court has never comprehensively defined the difference

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contrast, solicitors make use of open pedestrian paths -- walkways and doorsteps -- that are essentially continuations or extensions of public forum streets and sidewalks. Thus, the difference between the deferential first amendment standard of *Cornelius*, and the much more rigorous first amendment standard of *Riley*, *Schaumburg*, and other door-to-door solicitation cases, reflects the important fact that in door-to-door cases solicitors tread where members of the public normally already may go. The "solicitor" organizations in *Cornelius* simply had no right in the first place either to enter the federal workplace or to participate in a federal campaign drive.

[9] A private property owner, of course, is free to exclude solicitors in order to protect his own privacy and that of his guests or patrons. *Schaumburg*, 444 U.S. at 639. The government, however, may not itself make that choice for the homeowner, storekeeper, or professional by banning solicitation. *Cf. id.* at 638. In the present case, the government is eliminating solicitation in a place open to the public -- an outside sidewalk. Hence, the analogy to a private landowner, *see* Brief for United States at 17, 22, while sensible with respect to postal interiors (where the "family" of employees and their patron "guests" cannot otherwise escape unwanted speech), does not hold true with respect to sidewalks open to the public.

between a public forum and a nonpublic forum. Nevertheless, the decisions of the Court do establish a number of criteria for determining the nature of a forum.

A public forum, first and foremost, is open to all comers. On such "quintessential" public fora as "streets and parks," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), all people are free to come and go as they please.

> Wherever, the title of streets and parks may rest, they have immemorially been *held in trust for the use of the public* and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality opinion) (emphasis added). No one is subject to eviction for trespassing, as on the nonpublic forum grounds of a jail. *Cf. Adderly v. Florida*, 385 U.S. 39 (1966). No one is subject to interrogation, or faces exclusion by a "bar letter," as on a nonpublic forum military base. *Cf. Greer v. Spock*, 424 U.S. 828 (1976); *United States v. Albertini*, 472 U.S. 675 (1985). Access is not "unlawful except under the terms and conditions specified," as with a postal letter box. *Cf. United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

Furthermore, while a public forum may be a "necessary conduit in the daily affairs of a locality's citizens," *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), no one need *remain* in a public forum in order to conduct his daily activities. Thus, it is characteristic of a public forum that there are no real captive audiences. "One who hears disquieting or unpleasant [speech] in public places . . . can get up and leave." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring in result) (internal quotation marks and citation omitted). The parkgoer who finds a political rally or march offensive can go somewhere else. The window-shopper who does not want to hear what the street preacher has to say can keep on walking, or can enter a store. The businessman who does not care to support a given charity can stare straight ahead and ignore the bell-ringing solicitor.

These open public places are crucial settings for free speech. Being "open for general public participation," *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984), public fora are consummately democratic. Being accessible without special authorization or charge [9] -- "permits or licenses to use them are not ordinarily required," *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 570 (1975) (Rehnquist, J., dissenting) -- public fora are available to the general citizenry regardless of money or power, and are thus "essential to the poorly financed causes of little people," *Martin v. Struthers*, 319 U.S. 141, 146 (1943). Being "freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama*, 326 U.S. 501, 507 (1946), public fora are ideal for reaching a diverse, and possibly quite sizable, audience. Being places of transient or strictly voluntary use, *see Lehman*, 418 U.S. at 303 (plurality) ("public thoroughfare"); *Heffron*, 452 U.S. at 651 ("conduit in the daily affairs of a locality's citizens"); *id.* ("relaxed environment"); *Lehman*, 418 U.S. at 307 (Douglas, J., concurring in result) ("recreational" setting "for Sunday chautauquas"), public fora leave the audience a "ready means of avoiding the unwanted speech," *Frisby v. Schultz*, 108 S. Ct. 2495, 2503-04 (1988).

The sidewalk outside the Bowie post office is precisely such a public forum. The sidewalk is "continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron*, 452 U.S. at 651. No fee or license is required. Users represent a cross-section of America -- people of all ages, occupations, and backgrounds. No one need tarry on the sidewalk -- users are free to ignore all speakers, if they choose, and proceed into the post office to go about their business. On the other hand, a person is free to linger and chat with a neighbor, to pause and read or laugh about a letter he has received, to discuss current affairs (or the

[9] The imposition of a fee for access does not necessarily defeat the public forum status of a location. A state fair, for example, admission to which is available to all for a price, is a "limited public forum." *Heffron v. International Soc'y of Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

weather) with a stranger, or to offer passersby some presumably vital message on a religious, social, or political theme. In short, the sidewalk outside the Bowie post office is "indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here," *United States v. Grace*, 461 U.S. 171, 182 (1983). This sidewalk is therefore a public forum. [10]

The petitioner, the United States government, raises several points in an effort to negate the public forum status of the sidewalk outside the Bowie post office. None of these arguments withstands analysis.

(1) Specific history

The government argues that there is no "strong and established history of regular use as a 'quintessential' public forum" for "Postal Service access walkways that are located entirely on postal premises." Brief for United States at 12, 21. This assertion misconceives this Court's forum analysis. Proper forum analysis looks at the *general characteristics* of the property, not the specific history of expressive activities in a particular place or type of place.

In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), a town claimed that its streets were not public fora because there was no "tradition" of "public communication" on narrow residential streets. *Id.* at 2500. The Supreme Court rejected this argument as irrelevant. *Id.* "No particularized inquiry into the *precise* nature of a *specific* street is necessary; *all* public streets are held in the public trust and are properly considered traditional public fora." *Id.* (emphasis added).

In the case at bar, the determinative factors are the characteristics that reveal the postal sidewalk to be inherently indistinguishable from other public sidewalks. *Grace*, 461 U.S. at 179, 182. There is no requirement of historic or frequent exercise of first amendment rights in order to cultivate or maintain the public forum status of a sidewalk.

[10] Of course, a place can be a public forum even if it "differs in significant respects from public forums such as streets or parks or even municipal theaters." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (facilities of public university). In the present case, however, the sidewalk is functionally indistinguishable from other public walkways.

(2) Primary purpose

The government suggests that the Bowie sidewalk was constructed for the purpose of providing pedestrian access, and that therefore there was no intention to create a public forum for expression. Brief for United States at 21-22, 29. But no such specific intention is required.

In *Jamison v. Texas*, 318 U.S. 413 (1943), the government argued that "[t]he streets of the City of Dallas are public property to be used primarily for the purpose of travel and the city owes appellant [leafletter] no duty to furnish her a forum . . . ." *Id.* at 413. The Supreme Court rejected this argument, declaring that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Id.* at 416.

Obviously, all public streets were built for vehicular traffic, all public sidewalks for pedestrian passage, and all parks for recreation and repose. These properties are public fora, not because of any specific governmental *intention* to create a forum for communication, but rather because of the essential *characteristics* of these places. When the government constructed the Bowie post office, it built a sidewalk meant to be used as a sidewalk. No specific, additional intention to create a forum for speech *per se* is necessary. [12]

(3) Design for postal business

In a very similar vein, the government claims to have designed the postal property "exclusively for the conduct of specific government business." Brief for United States at 22. While this observation has clear significance for the forum status of *enclosed* postal facilities, it is equally clear that the *open* sidewalk at issue here was designed for public passage, a purpose no different than that of any

[12] An express or clear intention is necessary, by contrast, when the government converts presumptively nonpublic forum property into a designated public forum. Thus, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the university intentionally opened classrooms to student groups. In *City of Madison Joint School Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976), the state by statute opened certain official meetings to the public. And in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the city concededly opened a municipal theater to all dramatic productions.

municipal sidewalk. The government may not defeat the public forum status of the sidewalk "by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *United States v. Grace*, 461 U.S. 171, 180 (1983) (sidewalks on perimeter of Supreme Court grounds).

(4) Physical separation

The government relies heavily upon the "physical separation" of the sidewalk in question from the municipal sidewalk and street. Brief for United States at 24-26. This separation, however, has no more independent significance than the physical separation of the sidewalks of one city block from those of another.

A physical border can put a pedestrian on notice that he is entering "some special type of enclave." *Grace*, 461 U.S. at 179-80. But if there is no special enclave, the physical separation is purely incidental. In *Edwards v. South Carolina*, 372 U.S. 229 (1963), for example, the state capitol grounds were presumably *physically* distinguishable from public ways. The crucial factor, however, was that the grounds were "open to the general public," *id.* at 230, and thus *functionally* indistinguishable from public ways.

In the present case, there is no "special enclave." The sidewalk outside the Bowie post office is concededly *not* available exclusively for postal business. On the contrary, strollers may come and go as they please, and activists are free to use the site to distribute literature to passersby, *see* Brief for United States at 4, 15, 16, 30, 37, or even to picket, *id.* at 15. Thus, while the government might in some circumstances use parking lots or other physical features to establish enclaves where access could be restricted, *cf. Grace*, 461 U.S. at 178, the government has not done so with respect to the exterior sidewalk at the Bowie post office.

Under these circumstances, then, the presence of a parking lot separating the federal from the municipal sidewalks outside the Bowie post office is no more constitutionally relevant than the presence of parallel or diagonal parking spaces separating a municipal sidewalk from a street. *United States v. Bjerke*, 796 F.2d 643, 654 (3d Cir. 1986) (Higginbotham, J., dissenting). To hold otherwise would be to "issue an open invitation for government architects and landscapers to surround public buildings with modern-day moats."

Id. at 655. The guarantees of the first amendment, however, are "not consigned to the mercies of architectural chicanery," *United States v. Kokinda*, 866 F.2d 699, 703 (4th Cir. 1989); government may not obtain, by the ink of an architect's pen, what the ink of the Founding Fathers' quills have forbidden: the power to create speech-free zones at will.

(5) Functional difference

The government asserts a functional difference between the sidewalk outside the Bowie post office and other public sidewalks. Brief for United States at 25. There is no such functional difference, however. As discussed above, the sidewalk at issue shares all the essential characteristics of any public forum property.

The government claims that this sidewalk has the "exclusive role of carrying patrons to and from the post office (and no other place)," *id.* at 26, but this is neither true nor relevant. A sidewalk on a block containing only one building -- like the Supreme Court Building in *Grace* -- is nonetheless a public forum. Likewise, a residential sidewalk on a cul-de-sac is a public forum even if only one house stands in the vicinity. *See Frisby*, 108 S. Ct. at 2500. What is essential is the nature of the property, not the numerosity of the buildings which abut that property.

Users of public forum property -- like users of the Bowie post office sidewalk -- need not have a specific "permissible" purpose or destination. If the Postal Service were to close its facilities and grounds to all except those on official business, this would be a different case. *Cf. Grace*, 461 U.S. at 178. But so long as outside postal sidewalks are open "for indiscriminate use by the general public," respondents may "justifiably" conclude that this sidewalk is a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). The government may not defeat the public forum status of the sidewalk outside the Bowie post office merely by claiming that the vast majority of pedestrians are en route to the post office on postal business.

(6) Selected access

Contrary to the suggestions of the government, Brief for United States at 29, this is not a case of "selected access." The government, having conceded "the fact that the general public was allowed free

and unrestricted access to the postal service walkway," *id.* at 28, cannot seriously compare this postal sidewalk to the fundraising campaign at issue in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), or the internal school mail system at issue in *Perry*, or the letterboxes at issue in *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981). Access is not the issue in this case; rather, the question is whether the government may "choose freely to admit all such traffic save for the traffic in ideas." *Greer v. Spock*, 424 U.S. 828, 861 (1976) (Brennan, J., dissenting).

The government's reliance on this Court's holding in *Greer v. Spock*, 424 U.S. 828 (1976), is misplaced. The property at issue in *Greer*, streets and sidewalks within a military base, is readily distinguishable from the open sidewalk at the Bowie post office. At Fort Dix, "[m]ilitary police regularly patrol[led] the roads within the reservations, and they occasionally stop[ped] civilians and ask[ed] them the reason for their presence." *Greer*, 424 U.S. at 830. In the instant case, however, there is absolutely no evidence that the sidewalks of the Bowie post office are patrolled by postmen or other federal officers or that patrons or others found thereon are interrogated as to the purpose of their presence on the sidewalk. Further, persons driving into Fort Dix were warned in advance, by signs, that they were subject to search while on the reservation. *Id.* There is no evidence that such is the case for persons entering the parking lot at the Bowie post office.[13] Finally, the main entrances to Fort Dix were guarded at least occasionally. *Id.* The government does not assert that it ever posts guards at the entrances to the parking lot or at the ends of the sidewalks at the Bowie post office.

The *Greer* Court emphasized the "special constitutional func-

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[13] A new regulation, which took effect June 12, 1989 (i.e., three years after respondents' arrests), provides that "[p]urses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection." 39 C.F.R. § 232.1(h)(1) (1989); *see* 54 Fed. Reg. 20,526-27 (1989). This regulation presumably is not intended to authorize postal officials to stop and frisk postal patrons absent probable cause to believe they have committed some offense. How much authority, if any, this regulation gives officials to poke into the personal belongings of patrons or their companions who are in such open, exterior areas as the sidewalk or parking lot is highly questionable.

tion of the military in our national life, a function both explicit and indispensable." *Id.* at 837. The government strains to find comparable special constitutional functions on which to posit a unique rule for post office sidewalks which are otherwise indistinguishable from the sidewalks of the surrounding municipality.

In fact, commentators have noted that post offices in many parts of the country function as the nerve center of the community, where everyone meets to socialize and find out what is happening. In many American post offices, "one is likely to find a long wooden bench where citizens can pass the time of day." Margolis, *In Rural America the Post Office Remains a Mecca*, Smithsonian, July 1983, at 63, 64. The post office in many American communities is a "mecca," *id.* at 63: users call it a place to "sit around and socialize," *id.* at 66, "to find out what's happening," *Everybody's Office: Bainbridge Post Office is Key to Town's Activities*, Postal Life Magazine, Mar.-Apr. 1980, a "meeting place," *id.*, "the nerve center of the community," *id.*, an "open forum," *Home is Where the Mail Is*, Postal Life Magazine, Nov.-Dec. 1976, at 13, "like having a general store. It gives everyone the opportunity to come together and see each other," *id.* at 14. Even in the highly urbanized setting of modern Manhattan, the steps of the General Post Office in Midtown continues to be a "found" space for people to congregate. L. Rivlin, "A Study of 'Found' Public Spaces" at 24 (paper read at 21st International Congress of Applied Psychology, July 1986, Jerusalem, Israel). Indeed, a report which the Postal Service commissioned explicitly acknowledged that "[s]mall post offices in small (and some medium sized) towns take on a community center function since they are sometimes the only point of casual social contact for people in the area." United States Postal Service, *Design Aesthetics and Postal Image: Final Report* 3-6 (prepared for the Real Estate and Buildings Department by Jay Farbstein & Associates, Inc., and Min Kantrowitz & Associates, Inc., Mar. 31, 1986). [14]

In sum, the local post office is a far cry from the military base

[14] Another writer describes the centrality of the post office function in early twentieth century America: "In the South, prominent men in town continued to congregate at the post office to await the daily distribution of the morning mail." C. Rifkind, *Main Street: The Face of Urban America* 186 (1977).

at issue in *Greer*. Free access to the grounds of a post office is understood to be the norm; it is not dependent upon the cordiality of the local commandant. [15]

(7) Destruction of public forum

Finally, the government argues that even if a public forum had once been present, imposition of a ban on all solicitation in 1978 "plainly altered the character of the forum." Brief for United States at 32.

It is true that the government "is not required to indefinitely retain the open character of [a] facility" which has become a public forum by designation. *Perry*, 460 U.S. at 46. Even assuming the sidewalk at issue here were a public forum only by designation, [15] however, the government still could not destroy that status simply by banning a particular type of expression. Government action that restricts speech in a designated public forum is "bound by the same standards as apply in a traditional public forum." *Id.* These standards would be totally meaningless if the imposition of a restriction on speech were by itself sufficient to negate the public forum status of the property. Under such a circular approach, any limitation on speech in a designated public forum would automatically trigger the deferential standards governing nonpublic fora.

Government "'may not by its own ipse dixit destroy the "public forum" status of streets and parks,'" *Grace*, 461 U.S. at 180 (quoting

[15] Congress, moreover, has authorized the Postal Service to use its post offices for "special nonpostal or similar services." 39 U.S.C. § 404(a)(6) (1983). Regulations specify that these special "nonmail" services include money orders, nonpostal stamps, U.S. savings bonds, postal savings, and mailing list service. 39 C.F.R. § 111.5(i)(4) (1989). The Postal Service may also use its city delivery offices to conduct Housing Vacancy Surveys for the Federal Home Loan Bank Board. 39 C.F.R. § 259.1(d)(1) (1989).

[15] The sidewalk in this case is a traditional public forum because it is inherently indistinguishable from municipal sidewalks. *Grace*, 461 U.S. at 179, 182. If the postal grounds were in fact a special enclave and the sidewalk at issue were instead more like an internal, private walkway, the sidewalk in this case would nonetheless be a public forum by designation because the government has bestowed upon its sidewalk all of the essential characteristics of a public forum sidewalk. *Perry*, 460 U.S. at 47. The distinction is immaterial on the facts of this case. Furthermore, the same constitutional standards govern traditional and designated public fora. *Id.* at 46.

United States Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981)). In the case at bar, the government has failed to present any principled reason why the sidewalk at issue should not be afforded the same constitutional status as any other sidewalk which is similarly open to general public use. This sidewalk constitutes a public forum under the first amendment.

b. The sidewalk outside the Bowie post office, aside from public forum doctrine, is compatible with peaceful solicitation.

Forum analysis provides a useful framework for measuring the competing interests in a free speech case. *Cornelius*, 473 U.S. at 800. But it is undisputed that a setting need not be a public forum in order for a speaker to have expressive rights.[7] One who is rightfully in a place "which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). This place "open to the public" may be a public library, *Brown v. Louisiana*, 393 U.S. 131 (1966), a courthouse corridor, *Cohen v. California*, 403 U.S. 15 (1971), an airport, *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the grounds of a statehouse, *Edwards v. South Carolina*, 372 U.S. 229 (1963), the grounds of the United States Capitol, *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972), or a bus terminal, *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). Indeed, even in places which are clearly *not* public fora, people retain the right to engage in free expression so long as that expression is not disruptive or destructive of the rights of others. *E.g., Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (school classroom); *Rankin v. McPherson*, 483 U.S. 378 (1987) (government workplace); *Garner v. Louisiana*, 368 U.S. 157, 201-02 (1961) (Harlan, J., concurring in judgment) (private lunch counter); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974) (welfare center).

The underlying test, then, is "whether the manner of expression

[7] The Court has noted the possibility that forum analysis may not even be applicable in "a case such as this in which the respondents already have access to the [relevant property]." *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573-74 (1987) (citations omitted).

is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[8]

Even aside from the question whether the sidewalk outside the Bowie post office may be labelled a public forum, then, respondents' activities were immune from prosecution because solicitation is an activity wholly compatible with the normal use of this sidewalk.

As noted above, door-to-door solicitation typically involves forays outside of public forum property and onto private walkways, in order to reach potential audiences. Thus, solicitation cannot be "basically incompatible" with the normal use of property otherwise reserved "exclusively" for access to and from a nonpublic parcel of property.

Much less can it be argued that solicitation on a public way, such as the sidewalk outside the Bowie post office, is "basically incompatible" with the normal use of such places. While solicitors may distract passersby or somewhat retard the flow of pedestrian traffic, these minor inconveniences are no different in kind from the myriad distractions and hindrances impinging upon public passage.

The sidewalk outside the Bowie post office is an ingress/egress route, the normal use of which is no different from the use of any other public pedestrian way. Thus, solicitation cannot be held to be inherently incompatible with the normal activity of the place. To hold solicitation on this exterior walkway to be fundamentally inconsistent with public passage would be to exalt efficiency over expression in an unprecedented fashion. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676 (citations omitted).

2. No valid governmental interest supports a ban on solicitation on the sidewalk outside the Bowie post office.

The protected status of solicitation under the first amendment,

[8] This test does not apply when, as in the *Cornelius* case, a person has no right to be in the nonpublic forum in the first place. *See* 473 U.S. at 808. Rather, this test provides the standard for measuring the free speech rights of one who is otherwise lawfully in a public place. *Jamison*.

and the general compatibility of solicitation with sidewalks open to free public passage, demonstrate the presumptive unconstitutionality of the government's ban on solicitation on such sidewalks. Nor has the government in the present case demonstrated any countervailing interest that would support such a ban.

a. The ban is an absolute, content-related prohibition on a type of expression.

The postal regulation at issue here is not a restriction on the time, place, or manner of solicitation. On the contrary, the Postal Service explicitly determined that "prohibition was preferable to any attempt to permit solicitation under regulation as to time, place, and manner." 43 Fed. Reg. 38,824 (1978). *See also* Brief for United States at 15 ("categorical ban on solicitation"). The restriction must therefore be viewed as a total ban on one form of expression, namely, solicitation.

The ban on solicitation is also tantamount to a content-based restriction. Respondents and others are free to enter postal grounds, give away literature, discuss political matters, accost passersby, and otherwise conduct themselves exactly as they have done in this case -- with one exception. They may not utter a request for funds.

It is entirely unclear what verbal or written phrases will trigger the proscriptions of the anti-solicitation rule.[19] What is clear, however, is that legality or illegality depends upon the words that respondents use. The ban on solicitation "is justified *only* by reference to the content of the speech," *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988) (emphasis in original), because all that distinguishes forbidden solicitation from permitted exhortation is the communication of a request for funds.

But a "law *directed at* [either] the communicative nature of conduct . . ., [or] at speech itself, [must] be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (1983) (Scalia, J., dissenting) (emphasis in original), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (quoted in *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989)). Hence, restrictions on solicitation for charitable or political purposes are

[19] In fact, the ban is unconstitutionally vague. *See infra* § II(C).

restrictions on speech, and are "subject to exacting First Amendment scrutiny." *Riley*, 108 S. Ct. at 2678.[20] Government may not dictate the content of speech, whether by forced speech or forced silence, *id.* at 2677, absent "compelling necessity, and then, only by means narrowly tailored," *id.* at 2679 (citations omitted). This same "exacting First Amendment scrutiny" applies to any "direct restriction" on protected solicitation, *id.* at 2673 (internal quotation marks and citations omitted), such as a flat ban.

The solicitation ban at issue here simply cannot survive this rigorous standard of constitutional review.

b. The ban on solicitation is not narrowly tailored or justified by compelling interests.

The government asserts a variety of interests in defense of its solicitation ban. A total ban, however, is simply not narrowly tailored to advance these interests. Nor are these interests sufficiently weighty to justify a prophylactic ban on a form of protected speech.

The constitutional defect of the solicitation ban is straightforward. A ban on solicitation is no more necessary on a public access route *to* a particular facility than it is on a public access route *by* a particular facility. *Cf. Grace*, 461 U.S. at 182. Solicitation is no more disruptive or annoying to the patron of a street-front florist than to the patron of a set-back post office. In essence, the Postal Service in this case claims for itself special immunity from the price of free speech, a price paid by all businesses and agencies that border on public forum streets and sidewalks. There is, however, simply no reason to judge a person less able either to avoid confrontation or to ignore solicitors when walking into the post office than when approaching and entering any other establishment.

[20] The same rigorous constitutional standard applies to the exclusion of particular speech -- such as solicitation -- from a public forum. In a public forum, "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest." *United States v. Grace*, 461 U.S. at 177 (citations omitted). The *Grace* Court clarified that prohibition of a particular expressive activity, such as picketing or leafletting, constitutes "an absolute ban on [such] types of expressive conduct." *Id.* at 181 n.10. Content-based restrictions in a public forum, of course, also trigger strict scrutiny. *Frisby*, 108 S. Ct. at 2500.

A second major constitutional defect lies in the government's attempt to single out solicitation for prohibition. The government has already conceded that "leafletting and distribution of literature . . . do not tend to interfere with the operation of the post office." Brief for United States at 30. Granted, a potential donor may impede traffic somewhat while discussing the worth of the recipient organization or fumbling for change. But encounters with picketers, leafletters, and proselytizers present equivalent opportunities for slowing up traffic. As the court below recognized, "inconveniences are not unique to solicitation; they would also attend the mere distribution of literature from a table on the sidewalk." 866 F.2d at 705. Indeed, a majority of this Court refused, in the *Heffron* case, to distinguish for constitutional purposes between solicitation and the mere distribution of literature. As the *Heffron* Court observed, "the oral and written dissemination of . . . views and doctrines . . . is [not] lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating [these ideas]." 452 U.S. at 647. While a heavily congested setting like a state fair arguably -- at least before *Heffron* -- could warrant separate restrictive treatment for solicitation, *see* 452 U.S. at 663-65 (Blackmun, J., concurring and dissenting), such considerations do not apply to ordinary sidewalks or to the sidewalk outside the Bowie post office. In short, the argument, "that the [restriction] should be sustained because it deals only with solicitation and because any [organization] is free to propagate its views . . . as long as it refrains from soliciting money . . . represents a far too limited view of our prior cases relevant to canvassing and soliciting . . . ." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628 (1980).

Thus, the government's concerns about potential disruption or annoyance of customers cannot justify a total ban on solicitation. Patrons are as free to ignore solicitors -- or attend to them -- as they are on any city sidewalk. Nor will patrons necessarily object more to a simple request for funds than to a disagreeable picket sign, pamphlet, or political proposition.

The government's professed concern with administrative inconvenience likewise fails to justify a total ban on solicitation. It is always easier, in theory at least, to ban speech than to regulate it. But

the first amendment forbids such legislative (or administrative) laziness, even if done in the name of efficiency: "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676 (citations omitted).

Moreover, it is far from clear that a total ban on solicitation would be less of an administrative burden on the Postal Service. A complex system of permits and placement rules for solicitors could entail a fair amount of administrative inconvenience. But this is not the only possible alternative. A much more attractive course would be to treat solicitors the same as all other users of the sidewalk outside the post office.

The postal regulations already forbid: littering, "creating any hazard to persons or things," or destroying property, 39 C.F.R. § 232.1(c) (1989); disorderly conduct, "loud and unusual noise," obstruction, interference, or disruption of postal patrons and employees, § 232.1(e); and depositing unofficial signs or literature on postal grounds, § 232.1(o). The government has not claimed that these regulations are unenforceable or administratively inconvenient. Moreover, these regulations apply uniformly to all users and all speakers, without singling out for especially harsh treatment those who engage in certain expression.

A ban on solicitation, therefore, accomplishes nothing except the prohibition of otherwise lawful solicitation -- that is, solicitation which is *not* hazardous, destructive, obstructive, excessively noisy, disruptive, and so forth. [21]

The solicitation ban actually increases administrative inconvenience. Unless postal officials decline to enforce the ban -- either completely or selectively -- these officials will have to undertake special scrutiny of the speech of those persons engaged in various expressive activities on exterior postal grounds. The ban does not apply unless the person in question "solicits." Making this determination can be rather complicated in itself. *See infra* § II(C). Oversee-

[21] The solicitation ban also creates an additional criminal count for use against those who engage in conduct which is already forbidden, if those offenders happen to be solicitors as well. In such cases, the ban adds an extra penalty for speech.

ing speakers in order truly to enforce a solicitation ban would require the same intolerable, intrusive content review that this Court has condemned as "excessive entanglement" in the context of establishment clause cases. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985). Government officials should no more be in the position of monitoring speakers, to see if they let slip a forbidden request for funds, than should these officials be in the position of monitoring publicly funded teachers, to see if they let slip a religious idea. *See Aguilar*, 473 U.S. at 413 (impropriety of close official supervision in "an attempt to guard against the infiltration of religious thought" in the classroom).

If someone obstructs the sidewalk outside the Bowie post office, the Postal Service may take action regardless of whether that person is also soliciting. But by prohibiting solicitation per se, government has banned speech itself. *See Texas v. Johnson*, 109 S. Ct. 2533 (1989) (ban on desecration of flag); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (ban on wearing protest armband); *Cohen v. California*, 403 U.S. 15 (1971) (ban on use of certain offensive words). The government may not do this without a much stronger showing of need than in the present case. [22]

C. The Ban on Solicitation Outside the Bowie Post Office is Unconstitutionally Vague on its Face and as Applied.

What exactly does the solicitation ban forbid? Neither the government, as the enforcement agency, nor the regulation itself pro-

[22] The government asserts the existence of supposedly ample "alternative channels of communication," namely, solicitation on the municipal sidewalk, and distribution of literature on the sidewalk outside the post office. Brief for United States at 39.

As the court below observed, however, the "municipal sidewalk . . . is hardly a viable alternative forum, since passing motorcars are not an inviting audience for speech or solicitation." 866 F.2d at 702. Furthermore, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

In *Heffron*, this Court noted the importance of the fact that the restriction on solicitation did not "deny . . . the right to conduct any desired activity at some point within the forum." 452 U.S. at 655. Moreover, solicitors were "not secreted away in some nonaccessible locations," but instead were placed "where visitors are expected, indeed encouraged to pass." *Id.* at 655 n.16. The postal ban on solicitation, by contrast, completely bars solicitors from the relevant forum.

vides any clear answer. In fact, the indefiniteness of the meaning of unlawful "solicitation," particularly as the regulation is construed by the government, is so serious as to render the solicitation ban unconstitutionally vague. [23]

This Court has repeatedly held that "'in the area of free expression . . . [p]recision of regulation must be the touchstone . . .'" *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2679 (1988) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Vague restrictions on expressive activity are inimical to these "most precious freedoms," *Riley*, 108 S. Ct. at 2680 (internal quotation marks and citation omitted). As this Court explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. at 108-09 (footnotes omitted). The solicitation ban suffers from

[23] Respondents, as the prevailing party in the court of appeals, are free to "assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered" by the court below. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

precisely these infirmities.

First, as enforced and applied by the government, the anti-solicitation regulation is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Obviously, a direct, face-to-face request for money would be a solicitation. But the government has conceded that any speaker desiring to engage in such direct verbal solicitation is free "to achieve virtually the same result through the distribution of informational literature that explains the purpose of the solicitation and instructs recipients where to send contributions." Brief for United States at 16. May speakers *verbally* "explain the purpose of the solicitation" and direct listeners "where to send contributions"? May speakers direct listeners to a companion waiting on the municipal sidewalk some seventy feet away? May speakers *accept* an unsolicited contribution? May they *suggest* such a contribution or even *mention* that possibility?

There are, of course, a vast array of methods for inducing potential donors to give money. Merely extolling the merits of a nonprofit organization can induce contributions. Indicating the dependence of an organization on donor generosity can have the same effect. Are these forbidden "solicitations" under the postal regulation?

Sometimes a person does not expressly request funds, but an invitation to give is understood. Thus, the street fiddler leaves an open violin case beside him, and the juggler leaves a hat or cape on the ground. Are these forbidden "solicitations"? May Christmas carolers accept coins from passing postal patrons? May a local civic organization provide a display of free literature and add an open cookie tin labelled "Free-will offerings"? May a street evangelist hand out tracts with prices marked on them?

In the case at bar, the evidence for the prosecution is notable for its reliance upon inference and extrapolation from circumstantial evidence.

The government did not charge respondents with commercial vending. Rather, the information alleges that respondents "did solicit contributions" on postal premises. *See* Information at 1. Much of the

evidence for the prosecution, however -- that some of the literature had prices marked on it (J.A. 25), that respondents extolled the merits of their publications (J.A. 37), and that respondents had two completed subscription forms and some blank credit card slips, one of which was at least partially completed (J.A. 24) -- is more consistent with sales than with "solicitation of alms or contributions." The lists of signatures that respondents obtained (J.A. 25) is not evidence of anything except the solicitation of information. And the one subscription form that is marked to indicate a donation of ten dollars (J.A. 24) proves only that respondents were willing to accept contributions, not that they actively solicited money.

Of course, it may be that the government interprets solicitation to mean "requesting *or accepting* contributions." The possibility of such an interpretation, however, only multiplies the vagueness of the solicitation ban.

What is "solicitation" under the postal regulation? It is impossible to know, given the government's equivocation regarding what is or is not deemed to be unlawful. Given the absence of even "minimal guidelines to govern law enforcement," *Smith v. Goguen*, 415 U.S. 566, 574 (1976), the regulation banning solicitation "allows policemen, prosecutors, and juries to pursue their personal predilections," *id.* at 575. Speakers, meanwhile, have no fair notice of what they may or must do to comply with the ban. As a consequence, they must "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (ellipsis, internal quotation marks, and footnote omitted).

The victim, of course, is the constitutional freedom to speak without fear of arrest and prosecution for having uttered forbidden words.

In light of all of the foregoing considerations, the efforts of the government to suppress solicitation through a total, vaguely-defined ban, must be held unconstitutional.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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